



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 74 OF 2017

MOHAMED ABDALLA MASAZA..... PLAINTIFF

-VS-

MOHAMED ABDALLA GOSI.....1ST DEFENDANT

LAND REGISTRAR KWALE.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. By a Notice of Motion dated 3rd May, 2017 brought under Order 40 Rule 3 and 4 of the Civil Procedure Rules the Plaintiff/Applicant is seeking the following orders: -

- 1) THAT this application be certified as urgent and service be dispensed with in the first instance.**
- 2) THAT pending the hearing and determination of prayer 3 below, the 1ST Defendant be ordered to comply with the Court Order of 9th March, 2017 and be ordered to immediately stop construction of any structures on the Suit Property and remove any form of debris and machinery brought on the Suit Property.**
- 3) THAT the 1st Defendant herein be committed to civil jail for a term of six months for contempt of Court for having deliberately disobeyed orders of this Court issued on 9th March, 2017.**
- 4) THAT the Court issues any other or further orders of the Court geared towards protecting the dignity and authority of the Court and to ensure compliance of the Court order of 9th March, 2017.**
- 5) THAT costs of this application be provided for.**

2. The Application is based on the grounds on the face of the Motion and supported by the Affidavit of Mohamed Abdalla Masaza, the Plaintiff sworn on 3rd May, 2017. Briefly, the Applicant avers that on 9th March 2017, the Court issued an ex-parte order restraining the 1st Defendant from, *inter alia*, trespassing or constructing on Suit Property and that the order was duly served on the Defendants. That the 1st

Defendant has defied the said order by continuing constructing at the Suit Property to the extent of almost completing the permanent structure constructed thereon. The Plaintiff states that the order of 9th March, 2017, has not been set aside, varied or discharged by the Court and the 1st Defendant's actions have adversely affected the operation of the Plaintiff as the 1st Defendant workmen continually trespassed onto the Suit Property and are threatening in nature when informed of the orders in place. It is the Plaintiff's contention that the 1st Defendant's deliberate disobedience of the court order cannot go unpunished since the Court's dignity and authority have been greatly undermined by the actions of the 1st Defendant.

3. The Application is opposed by the 1st Defendant who filed a Replying Affidavit sworn by himself on 14th June, 2017 in which he denies having disobeyed the Court Order. The 1st Defendant has admitted that the order was served on him but contends that he discontinued all construction that was going on. He denies constructing on land known as **NO.KWALE/NG'OMBENI/2390** except his residential house which he says he has been living in for over fifty years. The 1st Defendant avers that the Suit Property is being utilized by the Plaintiff who has built a house to completion and lives comfortably with his family despite the pendency of **ELC Case No.335 of 2011**. The 1st Defendant accuses the Applicant of making one Application after another to obtain orders which the Plaintiff himself does not respect and further accuses him of interfering with the Suit Land, consequent to which the 1st Defendant states that he has suffered irreparable damage as a result of theft of his property at the construction site. The 1st Defendant avers that he has sued the Applicant and won and that although the Applicant applied for **Judicial Review in Nairobi Miscellaneous Application No.1025** of 2007, the stay therein lapsed as the Applicant never pursued the case. The 1st Defendant states that he filed **Kwale SRMCC No.305 of 2008** seeking orders to restrain the Plaintiff from constructing on the suit Property but that the Applicant failed to abide by the order of that Court. The 1st Defendant maintains that the Suit Property known as **LAND REFERENCE NO. KWALE/NG'OMBENI/2390** is his ancestral/customary land even after succession proceedings.

4. Both parties filed written submissions which I have read and I need not reproduce their contents herein.

5. I have considered the Application, the Affidavits in support and against and the rival submission made. The standard of proof in matters of contempt of Court is well settled. It must be higher than proof on a balance of probabilities but not exactly beyond reasonable doubt. See the case of **Mutika –V- Baharin Farm Ltd (1985) KLR 227** and the case of **Refrigerator & Kitchen Utensils Ltd –V- Gulabchand Popatial Shah & Others, Civil Appeal No.39 of 1990**. This is because the charge of contempt of court is an offence of criminal character and a party may lose his liberty. I must therefore satisfy myself beyond any shadow of a doubt that the 1st Defendant disobeyed the order of 9th March, 2017.

6. In this case, the 1st Defendant does not deny that the Court Order was served on him. It is however his contention that he obeyed the order by not carrying on any construction after the order was served. In the Supporting Affidavit, the Applicant has annexed photographs of the some incomplete constructions. The 1st Defendant has also annexed almost similar photographs to his Replying Affidavit which according to him is for the abandoned constructions. From the photographs exhibited by both parties, it is difficult for the court to know when those constructions were put up.

7. The ex-parte orders was issued on 9th March, 2017 and the Application was fixed by the Plaintiff for inter parties hearing on 12th April, 2017. When the Application came up for hearing on 12th April, 2017, Counsel for the Plaintiff applied for an adjournment on the grounds that they were served with the Replying Affidavit late and needed time to show it to his client. Counsel for the Applicant also applied for leave to file a further Affidavit and further prayed for extension of the interim orders. The Application was then stood over to 22nd June, 2017 for hearing. Before that date, the Plaintiff filed the present Application on 3rd May, 2017.

8. In paragraph 5 of the Affidavit in support of the Application, the Applicant states that on or around 19th March, 2017 he noticed the 1st Defendant was still constructing on the Suit Property. If then the

Applicant noticed that the 1st Defendant was still carrying out constructions on the Suit Property on 19th March, 2017 in blatant disregard of the order of 9th March, 2017, why then did the Plaintiff not raise the issue in Court when the matter came up for inter parties hearing on 12th April, 2017. This raises some doubts on the part of the Plaintiff's allegations. In the Notice of Motion dated 8th March, 2017 the Plaintiff acknowledges that the 1st Defendant had entered into the Suit Property and began some construction. It is not clear to this Court which construction was undertaken before and which one was made after the issuance of the order. As already stated above, the 1st Defendant has denied carrying on with further construction upon receipt of the Court Order. The Plaintiff did not raise the issue when the matter was before Court on 12th April, 2017.

9. From the evidence on record, I cannot safely hold that the 1st Defendant disobeyed the Orders of the Court issued on 9th March, 2017. I am not satisfied that the Applicant has proved the alleged contempt on the part of the Respondent. Consequently, I do find that the Notice of Motion dated 3rd May, 2017 lacks merit and hereby dismiss it with costs to the 1st Defendant.

Delivered, signed and dated at Mombasa this 26th February, 2018.

C. YANO

JUDGE